I. JURISDICTIONAL STATEMENT 2
II. BACKGROUND AND PROCEDURAL HISTORY: 3
III. ISSUES SUBJECT TO ARBITRATION 3
1. Reciprocal Compensation 4
(a) Definition of "Local Calls" 4
(b) Eligibility for Tandem Compensation 5
2. Deployment of NXX Codes 6
3. (Resolved) 11
4. (Resolved) 11
5. Charges for CLEC Name Changes 11
6. Term of Agreement (GT&C 5.2) 12
7. Deposits, Billing and Payments 14
8. (Resolved) 18
9. (Resolved) 18
10. Third- Party Intellectual Property Rights 18
11. (Resolved) 20
12. (Resolved) 20
13. (Resolved) 20
14. Assignment 21
15. (Resolved) 22
16. (Resolved) 22
17. (Resolved) 22
18. Combinations of UNEs Generally 22
19. Enhanced Extended Loops ("EELs") 24
20. Local Loop Definition 25
21. (Resolved) 26
22. Dedicated Transport 26
23. Payload Mapping 27
24. Dark Fiber 28
25. Diversity 29
26. (Resolved) 30
27. Point of Interconnection 30
28. (Resolved) 32
29. (Resolved) 32
30. (Resolved) 32
31. Forecasting 32
32. Trunk Blocking 33
33. Trunk Utilization 34
34. Indemnity 35
35. (Resolved) 36
36. (Resolved) 36
37. (Resolved) 36
IV. COMPLIANCE WITH ARBITRATION STANDARDS 36

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Level 3 Communications, Inc.	:	
	:	
Petition for Arbitration Pursuant to	:	**00-0332**
Section 252 (b) of the Telecommunications	:	
Act of 1996 to Establish an Interconnection	:	
Agreement with Illinois Bell Telephone	:	
Company d/b/a Ameritech Illinois.	:	

ARBITRATION DECISION

By the Commission:

I. JURISDICTIONAL STATEMENT

When the parties are unable to reach accord on an interconnection agreement through negotiations either party may ask a state commission to arbitrate any open issues. Section 252 (b) of the federal Telecommunications Act of 1996 ("the Act") sets out the procedures for the arbitration of agreements between incumbent local exchange carriers ("ILECs") and other telecommunications carriers requesting interconnection. It prescribes the duties of the petitioning party, provides an opportunity for the non-petitioning party to respond, and includes the time frames for each action. Section 252 (b) (4) limits a state commission's consideration to the issues set forth in the petition and the response, and further provides that a state commission will resolve each issue by imposing appropriate conditions upon the parties to the agreement as required to implement subsection (c), i.e., Standards for Arbitration. Section 252 (d) sets out pricing standards for interconnection and network element charges, transport and termination of traffic charges and wholesale prices.

In resolving, by arbitration, any open issues and imposing conditions upon the parties to the agreement, a state commission is required to apply the following Section 252 (c) standards:

(1) ensure that such resolution and conditions meet the requirements of Section 251, including the regulations it prescribed pursuant to Section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

II. BACKGROUND AND PROCEDURAL HISTORY:

On November 30, 1999, Level 3 Communications, LLC ("Level 3") and Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech Illinois" or "AI"), a subsidiary of SBC Communications, Inc., began negotiations for an interconnection agreement.

The instant proceeding arises out of a Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois, which was filed by Level 3 on May 8, 2000. This pleading identified 37 open issues which the parties were unable to resolve through their negotiations and also set out their respective positions on each of those issues. On June 5, 2000, AI filed a response to the Petition.

Pursuant to proper notice, a pre-hearing conference was held on May 16,2000, before duly authorized Hearing Examiners at the Illinois Commerce Commission's ("Commission") offices in Chicago, Illinois. Appearances were entered by respective counsel on behalf of Level 3, AI and the Staff of the Commission ("Staff"). On this date a schedule was set for further filings and evidentiary hearings.

At the evidentiary hearings held on July 14 and 17, 2000, admitted into evidence were the verified statements of Andrea Gavalas, Timothy Gates, and William Hunt, III, on behalf of Level 3; Robert Harris, Craig Mindell, Eric Panfil, Timothy Oyer, Debra Aron, and Michel Silver on behalf of AI; and Tortsen Clausen, Bud Green, and Sanjo Omoniyi on behalf of Staff. At the close of cross-examination of the witnesses on July 17, 2000, the record was marked "Heard and Taken."

As the parties continued to negotiate throughout the pendency of this proceeding, several additional issues were resolved. Post-hearing briefs were filed by Level 3, AI, and Staff on July 31, 2000. At the time of these filings, only 20 of the original 37 issues remained for arbitration.

On August 7, 2000, the Hearing Examiners' Proposed Arbitration Decision was served on the parties. Level 3, AI and Staff filed Exceptions to the Proposed Arbitration Decision. Those arguments are considered herein.

III. ISSUES SUBJECT TO ARBITRATION

Level 3 initially sought arbitration of 37 issues. During the pendency of this proceeding, Level 3 and AI settled issues 3, 4, 8, 9, 11-13, 15-17, 21, 26, 28-30, and 35-37. By our count, the parties' briefs reflect that there are 20 issues which remain to be resolved through arbitration. We review each of these in order and as numbered by the parties.

1. Reciprocal Compensation

(a) Definition of "Local Calls"

Should ISP traffic be treated as local for the purposes of reciprocal compensation?

Level 3's Position

Internet service provider ("ISP") traffic is local for the purposes of reciprocal compensation. The concept of reciprocal compensation was to pay carriers for terminating the local traffic of other carriers. ISP traffic falls into that category and is indistinguishable from local traffic for that purpose. The matter has previously been considered by this Commission, and the Seventh Circuit Court upheld the Commission's decision that it was local.

The Federal Communications Commission ("FCC") issued an order declaring ISP traffic to be interstate but that ruling was overturned by the D.C. Circuit Court. Of the state commissions that have ruled on this issue, 33 of 37 have found this to be subject to reciprocal compensation. Level 3 agrees to be bound by any findings of a generic docket on reciprocal compensation.

There is no real difference between local and ISP calls. All of the LECs use the same facilities to transport and terminate calls. The methods and the suggestion that ISP calls be separated from local calls are impractical.

Ameritech's Position

AI's proposal excludes ISP-bound traffic from the definition of local calls. Local calls actually must originate and terminate with parties physically located within the same local calling area. Reciprocal compensation is applicable only for the voice portion of local calls. Internet calls are not subject to reciprocal compensation under this agreement or the Act.

In its brief on exceptions, AI excepts that the rate is excessive based upon Level 3's cost. Level 3 would be allowed to collect up to seven times the cost of the call based upon; (1) the length of an ISP call versus a local call; (2) its advanced "soft switched" technology which results in a lower cost for delivering to network traffic; and (3) some of its customers collocate with Level 3.

Analysis and Conclusion

Most recently this issue was visited by this Commission in Docket 00-0027, In the Matter of Focal. We determined, after considering the same issues, that ISP traffic is local for the purposes of reciprocal compensation. There is no evidence in this record that would change our opinion at this time.

Consistent with our finding in Focal, the companies should take note that the Commission may subject this reciprocal compensation rate to an adjustment, including a possible true-up or retroactive payment, based on its ultimate conclusion reached in its generic reciprocal compensation proceeding (ICC Docket 00-0555). Should the Commission order an adjustment to this reciprocal compensation rate, including a possible true-up or retroactive payment, it will not apply to any period prior to the approval of this interconnection agreement.

(b) Eligibility for Tandem Compensation

At what level should Level's 3's switches qualify for tandem compensation? Should the switches be required to perform the same functions as AI's or merely be able to cover the same geographic area?

Level 3's Position

Level 3 proposes language allowing any one of its switching entities to qualify for tandem compensation if it meets the criteria regarding geographic coverage set forth in Section 51.711 of the FCC's rules.

Ameritech's Position

Level 3 should not receive the rate for either tandem or transport elements of termination unless and until the following conditions are satisfied: (i) it proves that its switch serves a geographic area comparable to that served by AI's tandem switch and (ii) it proves that its switch performs the same functions on behalf of AI as AI's tandem performs. To satisfy the second of those two conditions, Level 3 must show that (a) it gives AI the option to connect directly to Level 3's end office function and thus avoid payment of the tandem rate (perhaps also the transport rate) if it so chooses, and (b) it defines its switches and offers interconnection on a nondiscriminatory basis for both the termination of local traffic by other LECs and the termination of toll traffic by long distance interexchange carriers.

AI's brief on exceptions states that resolution of the tandem compensation question cannot be deferred because it involves all traffic for Level 3. It is not likely that

the Commission will consider this issue in the generic docket. However, AI suggests that the issue could be deferred to such time as when Level 3 applies for compensation, by holding them to the requirements of Section 51.711(a)(3) applied consistently with paragraph 1090 of FCC's First Report and Order (FCC-96-325) in Docket 96-98.

Analysis and Conclusion:

This issue has not come to fruition as yet, because Level 3 is not claiming it is entitled to charge the tandem rate as of today. (Tr. 247). Rather, the parties' have asked the Commission to decide what language should appear in Section 1.1.29.2 of the General Terms and Conditions of the agreement to define the circumstances under which Level 3 will be entitled to charge the tandem rate in the future.

The issue of eligibility for tandem compensation is not limited to ISP traffic; rather, it pertains to any and all local traffic that originates on AI's network and terminates on Level 3's network, i.e., any and all traffic that is subject to reciprocal compensation. In light of the foregoing, Issue 1B should not be deferred to the generic ISP proceeding given that issue is not part of that proceeding.

We agree with the parties that this Decision should provide some language for the parties' agreement concerning the test Level 3 will eventually have to pass in order to qualify for the tandem rate. To be clear, the Commission is not ruling on whether Level 3's switch qualifies for the tandem rate today. Indeed, there is no evidence in the record to make such a ruling.

Therefore, we agree with the Section 1.1.29.2 language offered by AI, which states:

> "A Level 3 switch will be classified as a Tandem Switch when and to the extent that it meets the requirements of 47 C.F.R. section 51.711(a)(3) applied consistently with paragraph 1090 of the FCC's First Report and Order (FCC 96-325) in CC Docket No. 96-98."

It is in that regulation and that paragraph of the First Report and Order that the FCC has set forth that test for eligibility to charge the tandem rate. When Level 3 believes that its network has developed to the point that it qualifies to charge the tandem rate, Level 3 will take the matter up with AI, and the parties will either agree or disagree. If they disagree, the Commission will be called upon to decide the matter ***based on the totality of the evidence presented.***

2. Deployment of NXX Codes

a. Whether Level 3 should be required to compensate AI for interexchange transport and switching associated with its FX/virtual NXX service.

b. Whether an FX or NXX call that would not be local based on the distance it travels, is subject to reciprocal compensation.

c. Whether the parties' agreement should include Appendix FGA.

Level 3's Position

Level 3 would delete Appendices FX and FGA and related language included elsewhere in the contract that require it to pay AI for the use of unspecified facilities at unidentified tariffed rates for FX, FX-like, FGA and FGA-like services. Level 3 claims that AI has not defined "FX-like" or "FGA-like" services nor has it demonstrated that any additional compensation should be paid based on customer location. It opposes the suggestion that it pay some undefined amount for the facilities and services AI ostensibly provides in getting calls to virtual NXX customers.

Level 3 also takes issue with AI's Section 2.7 of the Appendix, Reciprocal Compensation, which specifies that Level 3 cannot receive reciprocal compensation when its customer is physically located outside the local calling area of the calling party.

Ameritech's Position

AI should not have to provide free interexchange transport and switching to subsidize Level 3's competing Foreign Exchange ("FX") services. It proposes contract language that would require each party to be compensated for the portion of the FX service it actually provides. Level 3 should not be permitted to charge reciprocal compensation on FX calls because such calls are, by definition, not local exchange calls. Level 3 also must have some revenue-sharing arrangement in place for Feature Group A ("FGA") service and it has offered no alternative to the Appendix FGA.

Discussion

NXX codes (the first three digits of a seven-digit number) are assigned to specific geographic areas. Carriers' billing systems will classify a call as toll or local by comparing the caller's NXX with the terminating party's NXX. FX service allows a customer physically located in one exchange to have a telephone number with an NXX code that is associated with a different exchange in a different geographic area. In giving a customer a number with an NXX code from a distant geographic area, FX service allows callers from that distant area to reach the FX customer for the price of a local call. To a billing system, such a call appears to be within a single NXX area, while in reality it travels a distance which would normally require toll charges. FX service is attractive to customers, such as ISPs, that want persons located in various geographic locations to reach them for the price of a local call.

Both AI and Level 3 provide FX services. AI asserts that the need for the Appendix FX and specific inter-carrier compensation arrangements with respect to FX services arises from the manner in which Level 3 is able to obtain an undue financial advantage through use of this service. AI explains that when it provides an FX service, its FX customer pays for the transport and switching costs incurred in carrying the call from the caller's rate center to the FX customer's physical location. In contrast, when Level 3 provides FX service, AI provides the very same interexchange transport and switching to carry the call from the caller's rate center to Level 3's point of interconnection ("POI"). Unlike AI's FX customer, however, neither Level 3 nor its customer pays anything for use of AI's network. As a result, AI maintains, Level 3 enjoys a "free ride" on AI's interexchange network which gives it an unearned cost advantage because it can offer its customers a rate with no interexchange transport or switching costs whereas AI must recover those costs from its FX customer. Even more egregiously, AI contends, Level 3 charges AI reciprocal compensation on calls to Level 3's FX customers, on the theory that these are "local" calls.

AI indicates, for example, that a call from an AI customer in Elgin to downtown Chicago travels a distance of some 40 miles and would normally constitute an intra-LATA toll call. If, however, the recipient of the call in Chicago is an FX customer assigned to the same NXX code as the originating caller in Elgin, the originating Elgin caller would be billed only for a local call because AIs billing systems recognize an intra-NXX call as a local call.

AI maintains that allowing a competitive local exchange carrier ("CLEC") this "free ride" distorts all of its incentives to invest and undermines the integrity of the competitive process. AI also contends that nothing in its proposals prevents Level 3 from providing FX service to whomever it wants. It simply would require Level 3 to pay something for its use of AI's network in providing this service. AI's witness explained that, if CLECs do not have to compensate AI for the use of its network in providing FX services, Level 3 will have little or no incentive to construct its own transport facilities. So too, AI maintains, other CLECs competing with Level 3 in the provision of FX services would face a competitive disadvantage vis-a-vis Level 3 unless they also took advantage of the free ride on AI's network instead of constructing their own facilities. Accordingly, facilities-based competition would be further reduced.

AI further points out that at least two state commissions have agreed with AI's position in their recent decisions and cites to relevant language on the issue set out by the Maine Public Service Commission on June 30, 2000, and the California Public Utility Commission on September 8, 1999.Both of these state commissions agreed, in essence, that reasonable interexchange intercarrier compensation is warranted for the routing of FX traffic.

Level 3 argues that AI's position that virtual NXX calls are actually toll calls was rejected by this Commission in the Focal arbitration. Also, according to Level 3, a

Michigan Arbitration Panel concluded that virtual NXX calls are "local" and rejected provisions proposed by AI to impose additional transport costs on CLECs.

Level 3 contends that AI is responsible only for carrying a virtual NXX call to the Level 3 POI - just as it does for every other local call. Once AI delivers the call to the POI, it is Level 3's responsibility to terminate the call wherever the customer may be physically located, such that there is no additional transport based upon the customer's location. As such, Level 3 sees no difference between physical local calls and virtual or FX calls.

Level 3 contends that putting the focus on the location of the called party is meaningless to a determination of how much responsibility each carrier actually bears in transporting a given call. It claims that customer location will not cause AI's costs or function to differ in the context of a call placed by an AI customer.

Level 3 maintains that AI's costs are the same whether the call terminates to a virtual or physical NXX customer served by Level 3. When one looks at how calls are always delivered to the POI irrespective of customer location, there is no "free ride" according to Level 3.

Level 3 opposes AI's efforts to restrict or inhibit the assignment of NXX codes by referring to customers' physical locations. It claims that AI's proposal would permit AI to avoid payment of reciprocal compensation to Level 3 by reclassifying these calls as toll and preventing its own customers from placing local calls.

According to Level 3, if AI succeeds in impairing Level 3 or any other CLEC from providing virtual NXXs by actually making CLECs pay AI for such calls, not only would AI customers no longer be able to reach their ISPs by dialing a local number but, because calls to the ISP effectively would be reclassified as toll calls, AI no longer would be obligated to pay the reciprocal compensation associated with local calls.

Analysis and Conclusion

(a.) The record indicates that FX service was developed in the context of a single-provider environment. In such times, the cost of an incoming call to the FX customer simply would be recovered from the FX customer. Now, however, with the opening of the local exchange market to competition, the carrier providing the FX service may differ from the carrier of the party calling the FX customer. That is the very situation in this case and AI is proposing that inter-carrier compensation, such as is commensurate with each carrier's degree of participation in the provisioning of FX or FX-like service (NXX), be required.

We note that AI's proposal in this case is different from that presented in the Focal arbitration. In that case, our finding was based on the question of whether Focal should be required to establish a POI within 15 miles of the rate center for any NXX

code that it uses to provide FX service and our consideration of the Focal evidence as to the number of POIs being established. Here, AI is asserting that the lack of POIs requires it to carry a call long distances with no compensation for the haul.

From the evidence presented, we note a number of economic and policy perspectives that drive AI's proposal. While Level 3 does not address these concepts directly it has set out its own policy-based arguments. In particular, it maintains that through the use of virtual NXX assignments, Level 3 and other CLECs provide a valuable service which allows ISPs to provide low-cost advanced services to their customers who can gain Internet access by dialing a local number. Neither party tells us enough about the technological and economic underpinnings in the NXX or FX situation, such as were afforded the California Public Utilities Commission, Decision No. 99-09-029 (September 2, 1999).

Level 3 opposes paying AI any additional compensation for calls based on customer location. It maintains that when an AI customer originates a call, AI's responsibility for the call ends when it delivers the call to the POI it has established with the CLEC. Once the call is handed off at the POI, the CLEC is responsible for the costs of delivering the call to the terminating number.

In other words, Level 3 tells us that AI is providing transport in the NXX situation no different from that which it is otherwise legally obligated to provide. On balance, AI offers policy considerations of some merit. Some of those concerns, Level 3 observes, will fall away given our findings in Issue 27 below. We agree. Moreover, Level 3 maintains, the FCC's "rules of the road" as set out in TSR Wireless, LLC v. U.S. West Communications, Inc., Memorandum Opinion and Order, FCC 00-194 (June 21, 2000) make clear that the originating carrier is responsible for the cost of delivering the call to the network of the co-carrier who will terminate the call. On the basis of this legal authority, and the limited record before us, we find in favor of Level 3 on the first of the three questions before us.

(b.) The reciprocal compensation portion of the issue is straightforward. The FCC's regulations require reciprocal compensation only for the transport and termination of "local telecommunications traffic," which is defined as traffic "that originates and terminates within a local service area established by the state commission." 47 C.F.R. 51.701 (a)-(b)(1). FX traffic does not originate and terminate in the same local rate center and therefore, as a matter of law, cannot be subject to reciprocal compensation. Whether designated as "virtual NXX," which Level 3 uses, or as "FX," which AI prefers, this service works a fiction. It allows a caller to believe that he is making a local call and to be billed accordingly when, in reality, such call is travelling to a distant point that, absent this device, would make the call a toll call. The virtual NXX or FX call is local only from the caller's perspective and not from any other standpoint. There is no reasonable basis to suggest that calls under this fiction can or should be considered local for purposes of imposing reciprocal compensation. Moreover, we are not alone in this view. The Public Utility Commission of Texas recently determined that, to the

extent that FX-type calls do not terminate within a mandatory local calling area, they are not eligible for reciprocal compensation. See, Docket No. 21982, July 13, 2000. On the basis of the record, the agreement should make clear that if an NXX or FX call would not be local but for this designation, no reciprocal compensation attaches.

(c.) Finally, with respect to Appendix FGA, the only proposal on the table is that of AI, and Level 3 has not apprised us fully as to the specifics of its objections. Hence, on the understanding that the FCC requires such action, which Level 3 does not dispute, the AI language should be adopted subject to the deletion of "FGA-like" language and replacing the language with "FGA.".

3. (Resolved)

4. (Resolved)

5. Charges for CLEC Name Changes

Who should bear the costs for changes to the records, systems and data bases if the CLEC changes its name during the course of the agreement?

Level 3's Position:

AI should not be able to charge Level 3 on an individual case basis for processing name changes. To the extent that AI absorbs the cost of processing customer name changes as a cost of business in the retail context, Level 3 maintains that there is no principled reason for it to impose the costs of processing name changes on its wholesale customers. Level 3's brief on exceptions asks this Commission to adopt a ruling by the Texas Commission and a proposed ruling by the California Commission that name change costs should be borne by AI as a cost of doing business. Level 3 is like any other large corporate client and should be treated the same.

Ameritech's Position:

AI incurs actual costs to implement a CLEC's change and it should have the right to charge appropriate non-recurring, cost-based rates, as is already covered by tariffs. More than just changing the master database may be involved. A CLEC can require the changing of the individual customers to reflect the correct CLEC information. Why should AI be financially responsible for changes occasioned by the actions of the CLEC? There are real costs involved in making all these changes and the burden

should be on the party requesting the changes. AI responds to Level 3 in its reply brief that free individual name changes are more than it provides for its corporate customers.

Analysis and Conclusion

When a CLEC seeks to change its name there are associated costs. AI contends that some of the costs are borne by the ILEC to change the records in its Operation Support Systems ("OSS") and the costs are not part of OSS administration. (AI brief at 6.) Level 3 asserts that AI changes names every day without charging its customers and to charge a wholesale customer, which happens to be its competitor, is discriminatory.

The question is, are name changes merely a cost of doing business as Level 3 asserts or are they a burden unfairly imposed on AI? Level 3 asserts that hundreds of customers a day required changes which AI processes without charge. The CLEC's customers, therefore, should not be treated any differently. AI's charge is based solely on the fact that Level 3 is a wholesale customer. This argument is persuasive to the extent that Level 3's customers are entitled to the same service as AI's customers. The sheer number of accounts AI changes should not matter. The argument that Level 3 causes the name change is no different than saying that the individual customers also cause the change. To that extent AI should bear any costs of making changes to its master billing accounts of the CLECs.

AI points out that, at the CLEC's direction, it must update the accounts of each of the CLEC's customers in the database to reflect the correct information. That service is not normally provided to other customers. Therefore, any additional services requested other than changing the master billing database should be paid for by the requesting party.

The Texas Commission case cited by Level 3, Southwestern Bell Arbitration PUC docket No. 21791, determined that each party to the agreement shall be responsible for the cost of name changes as a result of corporate restructuring. Further, MCIW is SWBT' s customer under that agreement and should be treated as such. AI has agreed to make the necessary changes to its master data base. As AI points out, Level 3 could require them to make additional changes, which indicates that this is a non-essential additional service. Level 3 does not challenge this assertion. AI also points out that this is not something it does for its business customers. AI is required to give only the same service on the same level as it gives to its own customers. Anything more appears to be a premium service and should be paid for, no matter how nominal the cost.

6. Term of Agreement (GT&C 5.2)

When should the instant agreement expire?

Level 3's Position:

Level 3 would have the agreement expire after three years.

A three-year term would provide certainty and cost savings. According to Level 3, requiring it to renegotiate all relevant interconnection terms at intervals of less than three years would make it difficult for the entity to effectuate a stable long-term plan for entry and development of operations in Illinois. It maintains that there is no need to throw out the entire contract after one year simply because changes in law or technology might occur within the next year or so.

Ameritech's Position:

AI would have the agreement expire after one year.

A one-year term is appropriate given the frequent changes in technology and regulatory schemes. AI maintains that it is reasonable to allow for shorter term interconnection agreements so that parties can keep pace with and renegotiate in light of changed market conditions. It points out that negotiation increases costs and uncertainty for both parties such that the incentive to renegotiate is minimal absent any changed market conditions. In the final analysis, AI indicates that it is amenable to a two-year term.

Analysis and Conclusion

We believe that a company cannot implement its business plan efficiently if the contracts on which it relies expire within a short time interval. We further recognize that there are significant costs to negotiating and/or arbitrating a new agreement in terms of time, money and human resources. On the other hand, the telecommunications field is changing so rapidly that contract provisions which are reasonable under the law and circumstances at one point in time may be rendered obsolete, ineffective or burdensome under the law and circumstances which develop at a later point in time.

Level 3 states that the undisputed intervening law clause of the contract, i.e., Section 21, provides that if a change in the law affects a contract provision, the parties "shall" renegotiate the affected provision. Likewise, Level 3 maintains, changes in technology can be addressed through renegotiations and amendment. AI, however, raises the point that while the parties are entirely free to negotiate amendments to the agreement if there are changes in the market or technology, this is no guarantee that "both parties will be willing" to renegotiate. Only a shorter term will ensure that terms that have become onerous or outdated due to market changes are renegotiated.

I In balancing all of these interests, we agree with Level 3 and find the proposal of a three-year term reasonable.

7. Deposits, Billing and Payments

The debate surrounding Issue #7 is twofold: First, whether Level 3 should be required to post a deposit at the onset of the agreement, absent a satisfactory credit history, and if so under what conditions, terms and amounts. Secondly, the method that shall be employed to handle legitimate disputed amounts between the parties.

Level 3's Position

Level 3's position is that it should not be required to provide to each Ameritech affiliated ILEC an initial cash deposit ranging from two to four months of projected average monthly billings as a precondition for Ameritech's furnishing of resale services or UNEs. It proposes to delete the entire deposit section because AI has not shown Level 3 to be a credit risk such that protection against nonpayment is needed.

Level 3 also claims that Ameritech's deposit requirement is subjective and subject to error. With respect to the subjective nature of Ameritech's deposit requirement, Level 3 implies that if the section were modified to set out objective criteria, that could not be manipulated, to identify when a deposit would be required, it might agree to a deposit reference being in the Agreement. Level 3 also criticizes Ameritech's proposal, which is based on delinquency notices, because the notices can be sent out in error or when Level 3 submits a good faith billing dispute.[1]

Furthermore, Level 3 faults Ameritech's deposit requirement because it is significantly different than the standard Ameritech uses for business customers. Thus, according to Level 3, Ameritech is discriminating against CLECs.

Level 3 claims that the bill due date is an insufficient time period in which to determine the magnitude of disputed amounts. Regarding legitimate disputed amounts between parties, Level 3 argues that (a) the burden of proving the amount should not rest with Level 3, (b) the payment portion should be reciprocal (i.e., AI should pay interest on late payments as well), and (c) it is unreasonable for Ameritech to increase the deposit or suspend service if Level 3 fails to pay within five days of the due date.

Ameritech's Position

It is AI's position that CLEC's without a satisfactory credit history should be required to provide an initial deposit before obtaining resale services and UNEs. AI also maintains that CLEC's should provide notice of billing disputes before the bill due date so that the disputed charges may be resolved within a reasonable time.

[1] Level 3, Initial Brief at 51.

According to AI, the Commission first must decide whether (as AI maintains) CLEC's without a satisfactory credit history should be required to make a deposit (which earns interest and will be returned if the CLEC pays its bills) before obtaining resale services or UNEs from AI. If the Commission agrees that a deposit is appropriate, it must decide whether AI's suggested amount is proper. Finally, it must also resolve disagreements concerning details of the contract language that will excuse Level 3 (and other CLEC's) from the deposit requirement.

AI contends that it is common business practice to obtain a form of security when extending credit. AI claims that it is extending credit to a CLEC because its services or UNEs are provided before a bill is rendered and the CLEC is not obliged to pay the bill until 30 days after the bill is rendered. Ameritech also provided evidence which showed that Level 3 had considerable past due amounts with Ameritech on May 10, 2000, and July 10, 2000.[2] These past due amounts, according to Ameritech, shows that Level 3's ability to pay its bills has no bearing on whether Ameritech will, indeed, be paid.

Ameritech also urges the Commission to approve its proposed amount as a deposit requirement, which is based on "two (2) to four (4) months of projected average monthly billings." (Where Ameritech Illinois has been doing business with the CLEC at the time the deposit is to be made, the "projected average monthly billings" are based on actual historical billings.)[3] Ameritech contends that this is a reasonable approach because it secures payment for the amount of credit Ameritech is actually extending to the CLEC and is proportional to the CLEC's projected purchases.[4] Ameritech also supports its deposit requirement by pointing out that Level 3 would not be required to make a deposit if it had a satisfactory credit history and that Level 3 will be refunded the deposit, with interest, if it pays its bills in a timely fashion.[5]

AI also objects to the provision that Level 3 need not put disputed amounts in escrow unless there are more than two disputes within a 12-month period.

Staff's Position

Staff views an initial deposit to be commercially acceptable, but recommends that the amount of such deposit be based on objective criteria, fairly applied, and related to the credit history of the CLEC. Staff avers that Ameritech's demand for a deposit would need to be examined based upon a standard of reasonableness and whether the imposition of an initial deposit would be onerous and/or a barrier to competition.[6] According to Staff, requiring a substantial deposit based upon AI's delivery of a delinquency notice in a twelve-month period is subject to error and abuse.

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[2] Silver Direct at 11, Silver Rebuttal at 2-3.
[3] Tr. 556; 566-67.
[4] Ameritech Brief at 32-33.
[5] *Id.* at 33.
[6] Staff Brief at 6.

Staff recommends a notice period of 30 days to commence after the bill due date for notice of disputed amounts and payments of deposits. In instances of payment disputes (where no deposit is made), Staff would recommend that, at the least, a 15 day notice be given (after failure to pay deposit when due) prior to disconnection.

In its exceptions to the HEPAD, Staff proposed language which would, according to Staff, clarify the following issues: (a) whether or not an initial deposit is required for a new or recently established CLEC, and if so, the amount of the deposit and (b) the criteria for determining whether a CLEC is "late in paying."[7]

Analysis and Conclusion:

It is common business practice for a party to protect its interest by requesting some type of security in the form of a deposit. The criteria for determining who is required to post a deposit should not be based on the party's ability to pay but whether a party is promptly paying its bills. Other jurisdictions have determined that a deposit by a CLEC is appropriate where the CLEC's credit history is either non-existent, inadequate, or poor. However, Ameritech has failed to show that CLEC's pose any greater (or lesser) risk than does any other business customer. Additionally, the amounts Ameritech has claimed as losses due to CLEC nonpayment are meaningless unless they relate to overall charges or similar risks with other customers. Ameritech merely quoting dollar amounts without providing necessary context to these numbers (i.e., percentage of business losses) is not sufficient evidence to show that non-payment by CLECs is an acute problem, as opposed to a regular business occurrence.

Level 3 correctly points out in its argument[8] that the terms of this agreement with respect to deposits are different than the standard Ameritech uses for its own business customers. The Commission is concerned by this inconsistency. The Commission is also concerned by the resulting outcome of applying Ameritech's deposit requirement for its business customers to CLECs. As Level 3 points out, one of the standards for establishing credit for Ameritech's business customers is by paying a deposit in an amount not to exceed four months of the customer's estimated monthly billing.[9] By applying this standard to CLECs, and allowing Ameritech to arbitrarily determine how many months worth of deposits should apply, Ameritech's deposit requirement would remain subjective and open to abuse. Unlike business customers who may be able to choose a competitor to Ameritech for provisioning business services, due to the monopoly nature of UNEs, CLECs are limited to either abiding by Ameritech's terms or not providing service via UNEs (which could have an adverse impact on competition in Illinois). Thus, the Commission can not endorse a proposal that provides Ameritech the ability to impede competition.

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[7] *See* Staff Brief on Exceptions at 3-4.
[8] Level 3 Brief at 52.
[9] *Ibid.*

In light of this concern, the Commission concludes that the method by which Ameritech determines the necessity for a deposit for its business customers, as established in Ameritech's retail local services tariff, is reasonable for this agreement - with a slight modification. Instead of relying on Ameritech to determine the amount of the deposit, we base the number of months of deposit on the number of months the CLEC is late in paying. For example, if Level 3 is late in paying three times in a 12-month period, a deposit equal to two month's projected average monthly billings would apply. Similarly, four late payments by the CLEC in a 12-month period justify three months deposit, and five late payments or more in a 12-month period justify four months deposit. For a new or recently established CLEC that does not have a 12-month payment history with AI (or any SBC affiliate), the initial deposit will be based on 2 months of projected monthly billings, as recommended by Staff.[10] As Staff correctly points out, Section 7.4 of the General Terms and Conditions, as amended in accordance with the above conclusions, will permit Ameritech to increase the initial deposit (in accordance with the above terms) if the CLEC fails to maintain timely compliance with its payment obligations.

The Commission also agrees with Staff's recommendation that the criteria for determining whether a CLEC is "late in paying" should be clearly specified. First and foremost, the Commission concludes that in accordance with usual business practices, a payment is considered late if it is received five days or more after the payment due date. However, we agree with Staff's proposal that, after the five-day grace period lapses, a ten-day notice shall be sent to the CLEC by AI before suspending service in order that the CLEC may seek to correct the deficiency. Furthermore, as suggested by Staff and adopted by the Commission, a CLEC should not be deemed to be "late in paying" if (i) disputes regarding payment delinquency were the product of ILEC error or, as of the effective date of the interconnection agreement, had been resolved against the ILEC; or (ii) the CLEC is disputing any payments in compliance with the procedures set forth in the interconnection agreement. Thus, the revisions to Sections 7.1, 7.2.3, and 7.2.4, as proposed by Staff in its Brief on Exceptions (pp. 3-4) are accepted.

The Commission's approach with regard to determining deposits is reasonable for several reasons. First, this requirement will not be onerous or serve as a barrier to entry, since (a) the CLEC will receive a refund of the deposit amount, with interest, after a history of prompt payment has been established and (b) it will result in a deposit that is proportional to the size of the CLEC in question. Second, it removes the potential for Ameritech to abuse this requirement by basing the deposit on the CLECs history of prompt payment rather than an arbitrary amount determined by Ameritech. It is important to recognize that Level 3 did not necessarily object to a deposit requirement that is based on unambiguous criteria that Ameritech could not manipulate.[11] The above requirement mitigates Level 3's concern in this regard. Third, the requirement

[10] Staff Brief on Exceptions at 2.
[11] *See* Level 3 Brief at 50.

does not base deposits on delinquency notices, thereby removing the potential of Ameritech error from determining the deposit requirement. Likewise, the language proposed by Staff and adopted by the Commission will hold Level 3 harmless in the case that Ameritech incorrectly finds that Level 3 is late in paying its bills.

Despite Level 3's claims that it will not have enough time to properly examine its bills and resolve disputes by the bill's due date, it should be able to determine that a dispute does exist within that time frame. It is not unduly burdensome on Level 3 to give notice within the 30-day period that it is disputing the bill. Further, within another 30 days after the bill is due, Level 3 shall pay all undisputed amounts to Ameritech and further identify what the nature of the dispute is and the amount disputed. An escrow deposit of the disputed amount shall not be required unless the number of disputes exceeds two per 12-month period. Further, to protect Ameritech from frivolous disputes, if Level 3 fails to substantiate 75% of the disputed amount of any disputed billing period it shall constitute a late payment. Although Level 3 correctly points out that Ameritech possesses the records needed to prove disputed bills, Level 3's argument is invalid for two reasons. First, AI does not gain any advantage by issuing an erroneous billing. Second, if an erroneous billing does occur, by the Commission not requiring a deposit in escrow unless there are more than two disputes per 12-month period, the Commission has put in place the necessary safeguards to protect the CLEC.

The Commission further concludes that there is no reason that payment of interest should not be reciprocal for both parties.

AI wants written notice of a billing dispute and of the basis for the dispute so that it may be resolved within a reasonable time. Level 3 claims that when a dispute arises it often takes more time to determine what the actual disputed amount is.

AI has a legal duty to bargain in good faith throughout these negotiations. Many of the concerns of the parties are unfounded and predicated upon the mistaken assumption that the parties may not uphold their end of the agreement.

8. (Resolved)

9. (Resolved)

10. Third- Party Intellectual Property Rights

In addition to AI being required to use its "best efforts" to obtain third-party intellectual property rights for Level 3 to and for the sue of interconnection, network elements,

functions, facilities, products and services, should AI required to indemnify Level 3 against any claims or losses.

Level 3's Position:

At issue, according to Level 3, is the extent to which AI is required to obtain any consents, authorizations, or licenses to or for any third-party intellectual property rights that may be necessary for Level 3's use of interconnection, network elements, functions, facilities, products and services furnished under the agreement. AI must use its "best efforts" to obtain intellectual property rights for Level 3, as required by the FCC and as defined in Level 3's proposal. Level 3 further claims that the terms and conditions proposed by AI discriminate against it in violation of the Act and the FCC's direction, because they would require Level 3 to indemnify AI if its interconnection with AI or its use of AI's UNEs or services infringe upon any third-party intellectual property right.

Ameritech's Position

AI must use its "best efforts" to obtain intellectual property rights for Level 3 as required by the FCC and as defined in AI's proposal. AI, however, cannot be required to indemnify Level 3 against claims or losses arising from Level 3's use of such intellectual property.

Analysis and Conclusion

We believe it to be settled that AI will use its "best efforts" to obtain third-party intellectual property rights for CLECs to use AI's UNEs, OSS and interconnection. Indeed, under the FCC's Intellectual Property Order, as AI recognizes, an ILEC must use its "best efforts" to obtain such intellectual property licenses.

The question might remain, however, whether AI should be required to indemnify Level 3 against any "claims or losses for actual or alleged infringement of any intellectual property right or interference with or violation of any contract right." (GT7C 14.5.3). On this point, which Level 3 does not address, AI refers us to the FCC's recent pronouncement that its Intellectual Property Order did not require ILECs to indemnify CLECs for any intellectual property liability associated with their use of UNEs. (See, Texas 271 Order)

Level 3 also maintains that the FCC requires the ILEC to use its best efforts to obtain co-extensive rights for CLEC use of UNEs. To this end, Level 3 suggests a flaw in AI's latest proposal to the extent it states that AI has no obligation to seek rights for CLECs "to use any unbundled network element in a different manner than used by [Ameritech]". According to Level 3, the CLEC is entitled to the panoply of rights obtained by AI - not merely those that AI uses in its network.

In its Third Party IP Ruling, the FCC clarified an ILEC's obligations to provide non-discriminatory access to network elements, and its Order includes these directives:

- Section 251(c)(3) requires only that the intellectual property rights provided to a requesting carrier will entitle that carrier to use the element for the same uses as the ILEC (para. 16)
- To the extent that the requesting carrier intends to use the element in a different manner (e.g. in combination with some other element not contemplated by the ILEC's particular license) the requesting carrier is solely responsible for obtaining this right from the vendor. (para. 16).
- in order to limit its use to that contemplated by the contract, a competing carrier needs to know the extent to which the ILEC is entitled to use a particular element, such that parties need to negotiate a reasonable means of conveying this information while honoring the terms of confidentiality. (para. 17),

We see that each of these directives is reflected in the latest version of AI's Section 14.5 and that the FCC's Order is itself referenced therein. To the extent that Level 3 perceives itself subject to infringement claims simply because it is not using UNEs in exactly the same manner as AI, we direct its focus to the language in paragraph 16 of the Third Party IP Ruling. This provision provides guidance relevant to its concerns.

In response to Level 3's complaint, AI tells us that use of the phrase "commercially reasonable terms" (Section 14.5.1.1) does nothing to diminish its obligation to use its best efforts to obtain co-extensive rights for Level 3. It merely makes clear that AI is not obligated to obtain co-extensive rights from third parties under wholly unlawful terms and conditions. While Level 3 would have AI's language be replaced with some other wording to reflect more accurately the FCC's order it offers no language of its own.

In the final analysis, we find no legal infirmity in AI's language and would further note that Level 3 provides no substitute language for our consideration and review.

11. (Resolved)

12. (Resolved)

13. (Resolved)

14. Assignment

Should both parties be required to seek prior written approval of assignments and transfers of the agreement? What notice should be required?

Level 3's Position

Level 3 proposes that both parties be required to seek prior written approval of assignments and transfers of the agreement, including sales and exchanges. In its view, the parties should not unreasonably withhold consent of assignments. It also proposes that 30-days' advance notice of assignments, rather than AI's proposed 90 days, is sufficient.

Ameritech's Position

A CLEC may not assign or transfer its agreement to third persons without the prior written consent of AI; except that a CLEC may assign or transfer its agreement to an affiliate by providing ninety days' prior written notice of such assignment or transfer.

AI believes that this Order does not address the following issues; (1) a right to approve the assignment of interconnect agreements to affiliates, who have existing agreements with AI, (2) an agreement on charges prior to any actual valve charges; and (3) the required days' notice of assignment.

Analysis and Conclusion

Level 3 and AI both want the other parties to seek prior approval of the transfer or assignment of this agreement to another party. However, AI objects, stating that this is not a symmetrical situation and it should not be required to get the approval of CLECs to transfer or assign agreements.

The purpose of seeking this type of approval is to assure the parties that in the event of transfer or assignment they will not receive anything less than what they bargained for. We agree with AI's position. As the ILEC, it bears most of the burdens in these transactions. It is almost certain that, should it transfer or assign any rights, it will be to an equal or superior status. The same cannot be true of all CLECs. As the IIEC, AI is here to stay; any transfer or assignment to another company would involve close scrutiny by many regulatory bodies before it took effect. However, a CLEC transfer could occur in a short time and compel the ILEC to do business on terms which it normally would not accept. For that reason we believe that it is necessary for Level 3 to seek approval from AI prior to transfer or assignment of its rights under the agreement. We do not hold that the same is necessary for AI.

We find that AI has a legitimate concern when a CLEC seeks to transfer to an affiliate. First, AI is entitled to determine that the affiliate has the same ability to pay for the services provided. Secondly, an affiliate that has a prior agreement may now have two agreements. We expect AI not to delay a transfer for any reason other than to make the determination of the affiliate's means. The second sub-issue is a little less clear; AI does not propose any language to solve that problem, nor does Level 3. The affiliate therefore, would have the option after approval of the transfer by AI, either to opt into or merge the Level 3 agreement into its own. The reason for allowing this election is to ensure that AI's decision is based solely upon the criteria in its first sub-issue.

We agree with AI that the example posed by Level 3 is different from this situation. As posed by AI there are certain physical things that may be required to be done prior to transfer. However, we conclude that 60 days would an adequate time to effectuate these acts. It would be unfair to impose an unduly long interval constraint on Level 3 to accomplish a transfer.

15. (Resolved)

16. (Resolved)

17. (Resolved)

18. Combinations of UNEs Generally

Should Level 3 be given the ability to combine Unbundled Network Services with tariffed services other than access services?

Level 3's Position

In Appendix UNE, Section 2.9.8, AI would prohibit Level 3 from combining UNEs with any AI-tariffed service offering except collocation. Level 3 proposes amending the language of Section 2.9.8 to read "Unbundled Network Elements may not be connected to or combined with Ameritech Illinois Access Services."

Ameritech's Position

Section 2.9.8 should include the language proposed by AI which prohibits UNEs from being combined with AI access services or other AI-tariffed services, except for tariffed collocation services.

According to AI, the Act does not require it to allow combinations of UNEs with tariffed services other than tariffed collocation services. Therefore, the issue here is whether the agreement should bar Level 3 from combining UNEs with other AI-tariffed services.

To the extent that Level 3 relies on 47 C.F.R. 51.309(a), which states that an ILEC may not restrict the use of UNEs in a manner that would "impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting carrier intends," AI maintains its proposed language does not violate the rule.

AI maintains that there is nothing in the Act or FCC rules which entitles Level 3 to combine UNEs and tariffed services. Moreover, AI contends that Level 3 has not shown that its present, future or potential business plans would in any way be affected by an inability to combine UNEs and services.

Staff's Position

Staff recommends that Section 2.9.8 read as follows: "Unbundled Network Elements may not be connected to or combined with Ameritech Illinois access services."

Analysis and Conclusion

In this issue, Level 3 seeks the ability to combine UNEs with tariffed services other than access services. To that end, Level 3 seeks to limit the language of Appendix UNE, Section 2.9.8 to preclude only combination of UNEs with access services. AI asserts that the Act does not require it to allow combinations of UNEs and tariffed services other than tariffed collocation services. We agree that Level 3 is barred from combining UNEs with other tariffed services.

AI notes that when the FCC addressed loop-transport UNE combinations, that agency discussed three options through which CLECs could meet the conditions to lease such a combination. In each option, the FCC stated that "[t]his option does not allow loop-transport combinations to be connected to the incumbent LEC's tariffed services." *Supplemental Order Clarification*, para. 22(a), (b), and (c). The plain meaning of this language, repeated in each option presented to the CLECs, is that UNEs are not to be combined with tariffed services. Although the *Supplemental Order Clarification* discusses this issue in terms of EELs, Level 3 does not offer evidence that the principle set forth by the FCC should not apply to other UNEs.

So too, we are directed to paragraph 28 of the Supplemental Order Clarification wherein the FCC states that "....the co-mingling determinations that we make in this order do not prejudge any final resolution on whether unbundled network elements may be combined with tariffed services." (emphasis added). Given this particular choice of

words, the FCC appears to tell us that, as of now, UNEs may not be combined with tariffed services.

Level 3 relies on Section 251(c)(3), *codified at* 47 C.F.R. 51.309(a), which states that an ILEC may not restrict UNEs in a manner that would "impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting carrier intends." (Level 3 brief at 59.) We agree that, inasmuch as Level 3 could not identify any existing or hypothetical situation where it seeks to combine a UNE and a tariffed service, it is not "impair[ed]" in its ability "to offer a telecommunications service in the manner the requesting carrier intends." Intent requires a certain degree of specificity in determining a business plan or strategy. When an organization lacks any concrete example or desired outcome, as is the situation here, it cannot then argue that it is hampered in pursuing its strategy or service offering.

19. Enhanced Extended Loops ("EELs")

Should a CLEC be allowed to count ISP traffic as local for the purposes of qualifying for EELs?

Is a CLEC required to use AI's standard certification form? What, if any, termination and nonrecurring charges must Level 3 pay AI to perform such special access conversions?

Level 3's Position

ISP traffic should be counted as local traffic for the purpose of obtaining EELs. The ICC's current position is that ISP traffic is local. Level 3 should not be required to use AI's certification form. All the FCC requires is a letter setting out the request and the basis under which Level 3 would qualify. The AI form goes beyond the FCC requirements and would hinder market competition. Level 3 should not be required to pay termination and recurring charges for the implementation of EELs.

AI is entitled only to forward-looking non-recurring charges for any functions actually performed for special access conversions.

Ameritech's Position

Level 3 should use AI's standard certification form; cannot treat ISP-bound traffic as local for these purposes; and must pay applicable termination and nonrecurring charges.

Staff's Position

Staff contends that the "practical method of self-certification" adopted by the FCC is all that should be required of a CLEC. Thus, a CLEC should be required only to send a letter to the ILEC indicating under what usage option the requesting carrier seeks to qualify. Staff maintains that AI's requirement for Level 3 to pay applicable termination charges for special access converted to EELs is consistent with FCC rules. Any termination penalties, however, must be reasonable and comply with the Uniform Commercial Code and common law. Similarly, Staff believes that AI's requirement that Level 3 pay applicable service ordering charges and other administrative charges when it converts special access service to EELs is reasonable, provided that the service ordering charges are themselves reasonable and reflect the costs AI actually incurred.

Analysis and Conclusion

AI has a standard certification form that it requires for seeking a special access conversion. Level 3 avers that all the FCC requires is a letter setting forth a request and the local usage option under which the requesting carrier seeks to qualify. Staff has filed an opinion on this issue which essentially agrees with Level 3.

Under the FCC rules a letter is all that is required and is sufficient for the purposes of this agreement. AI's certification goes beyond the FCC requirements and would tend to hinder, not promote CLEC growth. Would AI be able to deny an EEL if a party failed to fill out part of the form but in all other respects complied with the FCC requirements? The additional requirements are surplus and should be voluntary.

In accordance with our decision in the Focal case, ISP traffic should be regarded as local for the purposes of EELs. There we expressly stated, "based upon the totality of the circumstances, we conclude that, for the purposes of the self-certification requirement, Focal should be allowed to count ISP traffic as local." However, the CLEC must state clearly in its letter on which of the three grounds it is seeking certification.

The FCC and various state commissions have held consistently that the CLEC should remain responsible for termination fees. There is no reason at this point to take a fresh look at termination charges. We agree with AI that if the FCC felt a fresh look were mandated or appropriate it would have said so in its UNE remand.

We also agree that AI is entitled to non-recurring charges for special access conversions. As it points out, these reimbursements are to compensate for the actual costs involved in the conversion. However, those charges should reflect the actual costs incurred on a TELRIC Basis

20. Local Loop Definition

Should AI be required to notify Level 3, within 60 days of deployment , of the availability of untarriffed high capacity loops?

Level 3's Position

Level 3 seeks to have AI provide it with notice of the availability of new untariffed high capacity loops within 60 days of deploying such loops in its network. According to Level 3, AI's testimony indicates that it will provide Level 3 with notice when it is deploying a tariffed high capacity loop, but it is unknown if all loop offerings will be tariffed. Level 3 contends that if a high capacity loop offering is not tariffed, it will have no way of knowing whether such loops have been deployed. Hence, it requests some type of written notification to that effect.

Ameritech's Position

AI should not be required to provide notice to CLECs of the availability of higher capacity loops after they are deployed in its network other than the notice already provided via tariff filing. AI's proposed language in Appendix UNE 7.1 faithfully implements ILEC obligations under the FCC's UNE Remand Order and, therefore, this language should be adopted. The notice Level 3 requests should not be required.

Analysis and Conclusion

This dispute centers on whether AI should be required to give notice to Level 3 of the availability of untariffed new high capacity loops within 60 days of deployment. We view this "notice" request as reasonable and believe that, for the convenience of both parties, such notice requirement can best be satisfied by a posting on AI's website.

21. (Resolved)

22. Dedicated Transport

Is AI required to provide unbundled dedicated transport not only to locations required by FCC Rule 319 but also between AI and another carrier where Level 3 has a presence? Is AI required to give notice to Level 3 within 60 days of the deployment of high capacity dedicated transport in the AI network?

Level 3's Position

Level 3 maintains that it should be able to order unbundled transport from AI to a point of presence it maintains in a third-party carrier's office where such transport exists. Further, AI should provide Level 3 with notice of the availability of new untariffed

high capacity transport offerings within 60 days of deploying such transport in its network.

Ameritech's Position

Unbundled dedicated transport is required only between the locations designated by the FCC in Rule 319 (d)(1)(I), and offices owned by third parties do not fall within this definition. There is no reason why Level 3 should receive notice of new facilities in a form any different than any other CLEC.

Analysis and Conclusion

Just as Level 3 has pointed out that the FCC requires only a letter rather than a form for certification, the FCC's Rule 319 has designated dedicated transport obligations to locations "owned" by the requesting carrier or the ILEC. We agree with AI that it does not have an obligation to provide dedicated transport to the third party locations even if Level 3 has a presence there. That there is another method available does not diminish AI's argument; in fact, it actually enhances the argument. Level 3 is not foreclosed from obtaining the transport, but may obtain it by having the third party order the dedicated transport and then Level 3 could obtain access through a cross connect. This would be in accord with the FCC's position on this matter. While it may not be the most efficient method, it still is the one mandated by the rules.

It is AI's position that it is sufficient to post notice on its web site (AI brief at 57). We agree that this is a proper method that affords all CLECs an equal opportunity to obtain such notice. While the original method of posting as part of its tariff tended to divert attention from the announcement, the web site is readily available to all CLECs. AI is directed to post within 60 days, at its web site TCNET.Ameritech.com, high capacity transport offerings and updates.

23. Payload Mapping

Is Level 3 entitled to payload mapping in the same manner and extent as AI treats itself and other CLEC's?

Level 3's Position

AI should be required to provide Level 3 with payload mapping in any technically feasible manner.

Ameritech's Position

AI will provide payload mapping to Level 3 to the same extent that it provides payload mapping to itself or to any other CLEC. Specifically, AI will provide Dedicated Transport as a point-to-point circuit dedicated to the CLEC at the following speeds: DS1 (1.544 Mbps); DS3 (44.736 Mbps); OC3 (155.52 Mbps); OC12 (622.08 Mbps); and OC 48 (2488.32 Mbps). AI will provide higher speeds to CLECs as they are deployed in its network.

Analysis and Conclusion

It appears that all Level 3 wants is to be treated the same way AI treats itself and other carriers. To this end, we believe it reasonable and hereby direct AI to provide payload mapping to Level 3 to the same extent that it provides payload mapping to itself or to any other CLEC in Illinois.

24. Dark Fiber

What percentage of spare dark fiber should a CLEC be allowed in a requested segment?

Level 3's Position

Level 3 seeks to obtain access to up to 50% of AI's spare dark fiber. Level 3, like any carrier, contends that it needs to access enough fiber along any given route to ensure adequate redundancy in the provision of services. Level 3 agrees with AI's definition of spare parts that already excludes maintenance spares, defective fibers, and fibers reserved for AI's forecasted growth from the fiber that will be available to CLECs. Therefore, relatively few fibers may be available to CLECs in any given segment and the 25% limitation AI proposes could prevent a CLEC from obtaining necessary redundancy along that route.

Level 3 wants to ensure that the Order provides for redundancy if it requires more than 25% of AI's spare dark fiber.

Ameritech's Position

AI maintains that Level 3, and all other CLECs, should be permitted to obtain access to up to 25% of AI's spare dark fiber. Given that the supply of dark fiber in AI's network is limited, as even Level 3 concedes, it is appropriate to place reasonable limits on the amount that any one CLEC may request.

AI further points out that there is no support for Level 3's assertion that it requires up to 50% of the spare dark fiber, or that 50% somehow constitutes a "practical quantity." Finally, AI claims that there is no conceivable reason for granting Level 3 access to 50% while other CLECs are limited to 25%.

Analysis and Conclusion

Level 3 points out that the only time that 50% of available fiber is significant is when only a few fibers remain and it needs whatever additional fiber is available. It then seems that 25% is acceptable for most situations. In light of the fact that there are other CLECs who will be making demands on AI, it appears that 25% is the appropriate level. However, when the smallest amount of available fiber in a segment is greater than 25%, Level 3 shall be entitled to the next available percentage of fiber necessary to achieve redundancy. This should address the concerns of Level 3 and ensure that AI has available fiber for other CLECs.

25. Diversity

Should diversity be made available at specifically defined TELRIC rates or can they be negotiated by the parties on a cost recovery basis?

Level 3's Position

Upon Level 3' s request, and where such interoffice facilities exist, AI should be required to provide physical diversity for unbundled dedicated transport at rates compliant with the Act. Level 3 asserts that diversity should be made available at specifically defined TELRIC rates in accordance with Section 251(d) whereas AI would price diversity on an individual case basis because diversity could involve both equipment and transport. If diversity is provided using any of the unbundled dedicated transport offerings priced in the agreement, those prices should apply.

Ameritech's Position

AI has no legal obligation to provide individual CLECs physical diversity that does not already exist on its network. If Level 3 requests such diversity, it is reasonable for the parties to negotiate appropriate rates that will allow AI to recover its costs for providing such additional service. While Level 3 would strike language to that effect, it offers no legal, technical or policy basis for its position. To the extent that Level 3 suggests that it might be willing to pay TELRIC rates, AI maintains that diversity is not a UNE or form of interconnection and thus is not subject to the FCC's TELRIC rules. According to AI, if it provides diversity for a CLEC on request, it may incur significant additional costs for the additional facilities, equipment, and work needed to achieve such diversity and, hence, must be allowed recovery of those costs. This is what AI's proposed Section 9.4.2 of Appendix UNE would require.

Analysis and Conclusion

"Diversity" is the general term for network arrangements that allow a call to be completed over an alternative route if, for some reason, the primary or usual route is not available. Routing diversity involves alternative physical arrangements designed to ensure service continuity where, for example, a fiber optic cable is inadvertently severed during digging operations. Physically diverse routing is particularly valuable in serving customers, such as financial institutions, needing extremely reliable communications capabilities that will survive all types of physical disasters or potential disruptions.

The parties agree that AI will provide Level 3 with routing diversity where requested and where required facilities exist. The disputed issue concerns the proper pricing of this diverse routing.

AI is correct in maintaining that diversity is not a UNE or a form of interconnection and, therefore, is not subject to the FCC's TELRIC rules. Nevertheless, we believe it proper that, to the extent individual components of a diverse routing arrangement constitute a UNE, these should be priced at TELRIC. Specifically, the UNE components of diverse routing (such as interoffice transport) should be priced at TELRIC levels. Any other non-UNE components, such as additional required equipment, should be priced at rates negotiated between the parties.

26. (Resolved)

27. Point of Interconnection

After having established a POI in each local access and transport area ("LATA") in which Level 3 provides local exchange service, at what level of traffic should Level 3 be required to establish a POI at the AI access tandems?

Level 3's Position:

Level 3 believes that it should be permitted to establish a single POI in each LATA in which it provides local exchange service. An additional POI should be established at an AI access tandem once the traffic exchanged between Level 3 and AI, with respect to that AI access tandem and subtending end offices, meets or exceeds an OC-12 level.

Ameritech's Position

Given that Level 3 initially will establish a single POI in each LATA in which it provides local exchange service, it should be required to establish an additional POI at each AI access tandem once the traffic exchange between Level 3 and AI with respect to that tandem and its subtending offices meets or exceeds a DS-3 level.

Staff's Position

Staff maintains that the requirement for a new POI at the OC-12 level is reasonable and would encourage deployment of efficient competitive fiber networks as the traffic volume grows.

Analysis and Conclusion

Level 3 currently has one POI in the Chicago LATA, which is located in downtown Chicago at the Wabash Tandem. From there, Level 3 traffic is routed to its switch about eight blocks away. AI has eight tandems located throughout the Chicago Area. NXX calls are transported by AI to the POI downtown and then by Level 3 to its switch. AI wants Level 3 to establish POIs at the tandems around the area. Once transferred to a POI, Level 3 would bear the cost of the transport. The closer to the initial call the POI is the less AI has to pay for transport. Each of the parties has suggested a level of traffic at which a POI should be installed.

AI suggests a DS-3 level or 672 calls being transmitted simultaneously. Level 3 suggests an OC-12 level or 8064 simultaneous call paths occurring simultaneously over the network. Staff agrees that OC-12 is an acceptable level. A DS-3 represents about 0.5% at a tandem, while OC-12 is about 5.7% lines behind the tandem. Level 3 admits that 95% of its traffic is ISP. The rapid continuous growth of the internet suggests that it is only a matter of time before Level 3 will have to install additional POIs in the Chicago LATA.

The installation of POIs affects other issues in this and future arbitrations. With a POI installed in a tandem the issue of the cost of regular and virtual NXX number transport all but disappears. The question then is, what is the appropriate level of traffic?

The average tandem in the Chicago area services about two to three hundred thousand terminus sites. At 672 peak calls, POI installation would be accelerated but would place an unfair burden on CLECs. Once again, the purpose of the Act was to encourage and foster CLEC competition through various protective schemes. To set the figure too high would place an extra burden on the ILECs and discourage fiber and technical growth in the Chicago LATA.

Further, the FCC has determined that a CLEC need have one only POI per LATA. The FCC in an amicus curiae brief filed in AT& T v. Hix states, "CPUC (Colorado Public Utility Commission) erroneously relied upon economic considerations in requiring

additional points of interconnection. The 1996 Act "bars considering costs in determining technically feasible points of interconnect access." (FCC Order 199.) If it were the desire of the FCC or the legislature to require more than one POI per LATA, that could have been expressed in the statutes. AI has only unsubstantiated statement that only one POI will affect service and presumably make a higher level technically infeasible. Some commissions have recognized the potential need for additional POIs. Level 3 has agreed to place other POIs in the Chicago LATA. However, we have already rejected the distance argument AI posed in Focal, as well as its free ride argument. The suggestion of OC-12 is reasonable under the circumstances, a level with which Staff agrees, and which does not pose any hardship for AI.

We feel that the threshold should be set at an optical carrier level. The FCC requires a CLEC to have only a single POI per LATA where technically feasible and multiple switching access charges have no bearing on technical feasibility. Both Level 3 and Staff have stated that 0C-12 is an applicable standard. Level 3 should be afforded every opportunity to establish itself in the Chicago LATA and to progress at a speed that is commensurate with sound economic growth. By allowing sufficient time and traffic to build up before requiring a POI to be established would accomplish this end and further ensure that Level 3 would be able to supply up-to-date technology. We agree that OC-12 represents the appropriate threshold level of traffic before requiring a POI to be established.

28. (Resolved)

29. (Resolved)

30. (Resolved)

31. Forecasting

Is Level 3 entitled to written confirmation from AI that it has received Level 3's forecasts and has included such information in its own forecast?

Level 3's Position:

Level 3 asks to receive written confirmation from AI stating that it has received Level 3's forecast and has included such information in its own forecast. According to Level 3, if AI uses such forecasts in its own planning, it may help AI to meet its obligations for provisioning trunks to Level 3. Further, Level 3 believes that AI should be obligated to provide notice of tandem exhaust situations and, pursuant to FCC rules,

notice of any network expansions, software and hardware upgrades or other network changes that would preclude AI from completing Level 3's orders. Such information is critical, Level 3 claims, to its planning process and reasonably related to improving its ability to serve its customers and add new customers to its network.

Ameritech's Position

AI's brief indicates that this matter is resolved.

Analysis and Conclusion

The particular notices which Level 3 seeks are, in our view, both reasonable and necessary. To be sure, each of these measures is intended to improve Level 3's ability to serve its customers and add new customers to its network. To the extent this may impose any undue burden on AI, we have not been so informed and will not speculate. Level 3's request is granted.

32. Trunk Blocking

Should the trunk-blocking objective be set at .5% or 1%?

Level 3's Position

Level 3 has requested a blocking objective of 0.5% for all trunk groups measured during peak usage.

Ameritech's Position

AI proposes a blocking objective of 1% for all trunk groups measured during peak usage. It asserts that there is no legal or policy basis for Level 3's request that the Commission require AI, whose network functions at the industry standard and long-established 1% blockage level, to redesign its network in order to achieve the 0.5% level that Level 3 desires. AI states that its network is designed so that during the busiest hour of an average day in the busiest month, 10 out of every 1,000 calls will be blocked because no trunk is available to carry them. According to AI, this 1% blockage rate is standard in the industry and has been the accepted norm in Illinois for years.

Staff's Position

Staff recommends that AI's blocking objective of 1% for all trunk groups, as measured during peak usage, be adopted because it is consistent with the standards set out in the Administrative Code.

Analysis and Conclusion

Staff witness Green concurs that the telecommunications industry has for decades engineered its trunking facilities at a P.01 and P.02 level of service which equates to one or two calls in 100 being blocked in the busy hour. His testimony shows that AI should be required to provide only the standards set out in the Administrative Code and not the higher standards requested by Level 3 which would force AI either to enhance the current network that it provides to itself and to other CLECs or to build a separate network just for Level 3. According to Staff, both of these measures would require AI to incur substantial costs with little or no benefit to telecommunications services in Illinois. We are convinced by the evidence and the underlying analysis here presented that AI's position is correct, reasonable, and should be followed.

33. Trunk Utilization

Should Level 3 be allowed to order additional trunks at 50% utilization or 75% as requested by AI?

Level 3's Position

Level 3 would like to have the ability to order additional trunks, based on trunk forecasts, when its existing trunks are at the 50% utilization level. In Section 8.4 of Appendix ITR, however, AI proposes to restrict orders for additional trunks until Level 3 has reached a 75% utilization level.

Ameritech's Position

Level 3 should be permitted to order additional trunks, based on trunk forecast, when its existing trunks are at a 75% utilization level. When Level 3's existing trunks reach a 50% utilization level, AI would like to accommodate projected increases in Level 3 traffic by (1) increasing Level 3's utilization of existing trunks to 75% and (2) allowing Level 3 to order new trunks when its utilization reaches 75%.

Analysis and Conclusion

The issue is whether Level 3's trunks are to be configured for 50% utilization, as Level 3 proposes, or 75% utilization, as AI proposes. Level 3 argues that a 75% utilization level would give AI a competitive advantage and restrict Level 3's ability to add high volume customers to its network. Additionally, Level 3 argues that AI's proposal would require Level 3 to plan carefully in several ways and on several levels to be sure that additional trunks will be ordered in time to be turned up within AI's provisioning intervals. AI maintains that its proposal encourages Level 3 to make

efficient use of the network without imposing inefficient buildout costs for new trunks before they are necessary.

A utilization level set at 50% would require AI to install new trunks even though Level 3 would have to double its total traffic volume before the existing trunks of Level 3 were fully used. The ability of AI to reclaim unused trunks does not eliminate this problem as there are no assurances that AI would be able to put those trunks to use and AI would thereby wind up with stranded installation costs. In our view, requiring Level 3 to be more efficient, i.e., plan carefully, outweighs having AI incur unneccessary cost. Thus, AI's position will prevail on this issue.

34. Indemnity

AI seeks specific protection for any unauthorized misuse of its OSS that is achieved via Level 3's systems.

Level 3's Position

The agreement already protects AI adequately and Level 3 should not be held responsible for the actions of other parties beyond its control.

Ameritech's Position

AI needs additional protection from the unauthorized misuse of its OSS by Level 3's users or employees. AI asserts that it should not be liable for the acts of others.

Analysis and Conclusion

While AI's concerns regarding the potential dangers to its OSS may be valid, it is unreasonable to require Level 3 to indemnify for the acts of others. The fact that a Level 3 customer causes harm to AI's OSS is not Level 3's responsibility. It is the equivalent of asking Level 3 to vouch for the good conduct and behavior of all its subscribers. This would amount to a near impossibility. Even employers are not required to vouch for the certain conduct of their employees unless they knew or should have known of their propensities.

AI's indemnity argument is flawed. The language seems to imply that Level 3 should indemnify AI for all claims regardless of fault. There is not any justification for that kind of language. As Level 3 points out in it brief, AI has recourse based upon the general provisions of the agreement.

35. (Resolved)

36. (Resolved)

37. (Resolved)

IV. COMPLIANCE WITH ARBITRATION STANDARDS

Pursuant to Section 252(c), state commissions are required to apply three standards when resolving open issues and imposing conditions upon parties to an Interconnection agreement in arbitration. The first standard requires the agency to ensure compliance with Section 251 and any rules promulgated thereunder. The Commission has reviewed each of the conclusions reached herein and finds that they are in compliance with the relevant statutes and rules. Under the second standard, the state agency is required to establish rates according to Section 252(d). The third standard requires the state agency to provide a schedule for implementation of the terms and conditions by the parties.

As a final implementation matter, the parties shall file, no later than fifteen calendar days from the date of service of this arbitration decision, the complete interconnection agreement for Commission approval pursuant to Section 252(e) of the Act.

By Order of the Commission this 29th of August, 2000.

Chairman